FILE COPY

FILED
MAY 25 1970
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1364

RALPH TROPIANO,
Petitioner,

vs.

STATE OF CONNECTICUT,
Respondent.

BRIEF OF STATE OF CONNECTICUT IN OPPOSITION TO PETITION FOR CERTIORARI

DAVID B. SALZMAN, Esq.,
Assistant State's Attorney,
121 Elm Street
New Haven, Connecticut,
Attorney for Respondent.

THE MACK CO., NORTH HAVEN, CONN.

In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1364

RALPH TROPIANO,
Petitioner,

vs.

STATE OF CONNECTICUT,
Respondent.

BRIEF OF STATE OF CONNECTICUT IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Whether this court should grant certiorari to review the sufficiency of the evidence in a state court criminal conviction.

2. Whether this court should agree to review a claim that is raised for the first time in the history of the case in the present petition. (The claim so raised is that the Fourth, Fifth and Fourteenth Amendments forbid "prosecution by information" and require a grand jury indictment.)

3. Whether certiorari should be granted to review a non-federal claim which was not timely raised below, which was decided in conformity with other Connecticut decisions, and which protests a practice since adandoned in the State.

4. Whether this court should review a ruling which permitted the jury to hear questions posed by police officers to co-conspirators of the defendant.

5. Whether this court should review the extent of cross-examination which was permitted by the trial court.

6. Whether this court should review the facts of this case which prompted the trial court to refrain from charging the jury concerning multiple conspiracies.

7. Whether this court should review the trial court's jury charge regarding certain taped conversations which the defendant conceded were admissible.

STATEMENT OF THE CASE

The defendant was arrested pursuant to a bench warrant dated February 20, 1964. (State R. 5) After the entry of a not guilty plea, and a few other procedural steps, the defendant eventually filed a Motion to Dismiss and/or Strike the Information on September 20, 1965, the day before the trial began. (State R. 17; Def's. App. 18a) The motion sought dismissal of the charges on the ground that, pursuant to the practice prevailing in Connecticut at the time of the issuance of the bench warrant, the warrant was issued upon representations of the State's Attorney rather than upon an oath or affirmation as required by the Connecticut Constitution. (This practice has since been abandoned in Connecticut.)

The Connecticut Supreme Court ruled, in conformity with its prior rulings on the same issue, that by waiting nineteen months, and by having submitted to the jurisdiction by his two not guilty pleas, the defendant had not timely raised the issue; it held that the trial court had not erred in denying the motion. (Def's. App. 18a, 19a)

The jury fairly could have concluded that the defendant was the "top man" in a gambling operation which involved men from both Hartford and New Haven. Initially, Guglielmo appoached Francis Reynolds, a detective in the West Hartford Police Department, for protection for the operation. DiBella and Stephen P. Ahern, a sergeant in the New Haven Police Department, joined the arrangements for protection. Eventually, Reynolds and DiBella met the defendant at a restaurant in New Haven. The opinion below accurately reflects the testimony: ". . . The defendant told Reynolds: 'The only thing I want from Ahern are the crap games. Horses can come later.' Reynolds asked the defendant how much Ahern was to get, and the defendant said, 'Quote a figure.' The defendant said that he wanted the crap games operated every night of the week otherwise they would 'get cold and the people would go to Bridgeport'." (App. 5a; R. 31-45)

Both Detective Reynolds and Sergeant Ahern were operating with the knowledge and approval of their superiors. The defendant was convicted, and sentenced to State Prison for not less than three nor more than six years. (State R. 18)

Other facts will be added in the appropriate places in the argument.

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE SUFFICIENCY OF THE EVIDENCE IN A STATE COURT CONVICTION.

Although the defendant recognizes in his brief (at p. 22) that this court will not grant certiorari to review the sufficiency of the evidence, he claims it should do so in this case. He advances two reasons. First, because the case presents a "sinister . . . threat to American courtroom justice" (Def's. Brief p. 22) and, second, because this case "borders precipitously" on being a case without evidence. (Def's. Brief p. 24)

There was ample evidence to support the conspiracy conviction in this case, the highlight being this defendant's conversation with the police officer from whom he thought he was purchasing protection for his illegal gambling operation: "The only thing I want from [Sergeant] Ahern are the crap games. Horses can come later." The conversation concluded after a discussion of the amount to be paid and of the frequency with which the crap games were to be held.

The opening paragraph of the decision in *Thompson* vs. *Louisville*, 362 U.S. 199, 4 L. Ed. 2d 660, 80 S. Ct. 619 (1960) reflects this court's consistent position of refusing to review the sufficiency of the evidence. This court does not grant certiorari to review evidence, to discuss specific facts, to review inferences drawn from the evidence, and it will not disturb findings of fact unless they plainly are without support. *NLRB* vs. *Waterman S. S. Corp.*, 309 U.S. 206, 208, 84 L. Ed. 704, 60 S. Ct. 493, 495, *reh. denied* 309 U.S. 696, 84 L. Ed. 1036, 60 S. Ct. 611 (1940); *United States* vs. *Johnston*, 268 U.S. 220, 227,

BLEED THROUGH POOR COPY

69 L. Ed. 925, 45 S. Ct. 496, 497, (1925); *General Talking Pictures Corp.* vs. *Western Electric Co., Inc.*, 304 U.S. 175, 178, 82 L. Ed. 1273, 58 S. Ct. 849, 851 (1938). Because there was ample evidence to support the verdict in this case, certiorari should not be granted to review its sufficiency.

II.

Certiorari Should Not Be Granted To Review The Grand Jury Claim, It Having Been Raised For The First Time Here.

For the first time in the history of this case, the defendant claims that his arrest was faulty because it was not the result of a grand jury indictment. (A related claim that the request for the bench warrant was not supported by an oath or affirmation will be discussed below.) He did not make the claim during the trial nor to the Supreme Court of Connecticut, and the Connecticut Supreme Court did not discuss the issue nor make any decision regarding it. At pages 39-40 of his brief the defendant concedes that he did not raise the issue in the courts below. This court has consistently refused to review an issue raised for the first time on appeal, particularly when the appeal is from a state court decision wherein the state court did not have an opportunity to pass upon the claim. *Beck* vs. *Washington*, 369 U.S. 541, 553, 8 L. Ed. 2d 98, 82 S. Ct. 955, 962, *reh. denied* 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1575 (1962); *Nelson* vs. *Los Angeles*, 362 U.S. 1, 9, 4 L. Ed. 2d 494, 80 S. Ct. 527, 532 (1960); *Adler* vs. *Board of Education*, 342 U.S. 485, 496, 96 L. Ed. 517, 72 S. Ct. 380, 387 (1952). Certiorari should not be granted to review this claim raised now for the first time.

III.

Certiorari Should Not Be Granted To Review A Non-federal Claim Which Was Not Timely Raised Below, Which Was Decided In Conformity With Other Connecticut Decisions, And Which Protests A Practice Since Abandoned In The State.

The defendant also complains that the Connecticut procedure which was followed in this case in securing the bench warrant was improper in that it was issued simply upon the request of the State's Attorney, and was not based upon an oath or affirmation as was required by the Connecticut Constitution.

Several facts are important. First, subsequent to the trial of this case, the Connecticut Supreme Court held that it was violative of the Connecticut Constitution for a bench warrant to issue merely upon the request of the State's Attorney. *State* vs. *Licari*, 153 Conn. 127, 214 A.2d 900 (1965). Consequently, the admittedly improper procedure which was followed in this case has been abandoned in the State of Connecticut. Today, the usual procedure in Connecticut is for the State's Attorney to present a written application for a bench warrant to a judge. Attached to the application are one or more affidavits which the State claims present enough facts upon which the judge may find probable cause for ordering an arrest. (The proposed information in which the crime is charged is also attached to the bench warrant, although Connecticut law does not restrict the State's Attorney from subsequently amending the information.) If the judge finds probable cause, he will issue the warrant.

BLEED THROUGH POOR COPY

Second, the Connecticut Supreme Court did not rule that the proper procedure had been followed by the State in this case. On the contrary, it ruled that the *defendant* had failed to raise a timely objection to the procedure followed. (Def's. App. 18a-19a)

Finally, the decision in this case was perfectly consistent with, and nearly identical to, other Connecticut decisions on the same issue. In *State* vs. *Orsini*, 155 Conn. 367, 379, 232 A.2d 907 (1967) less than a year elapsed between the date of the arrest and the raising of the objection to the bench warrant procedure, the objection again having been raised upon the eve of trial. As in this case, the court held that the defendant had submitted to the court's jurisdiction. See also *Reed* vs. *Reincke*, 155 Conn. 591, 597, 236 A.2d 909 (1967) in which the Connecticut Supreme Court held that it is necessary to raise an objection to the jurisdiction of the person prior to the entry of a plea on the merits in order to avoid a waiver of such a claim.

This court has usually refused to grant certiorari when (a) the practice complained of has been abandoned *Rice* vs. *Sioux City Cemetery*, 349 U.S. 70, 77, 99 L. Ed. 897, 75 S. Ct. 614, 618 (1955) or (b) when the claim has been raised beyond the time permitted by state rules, and hence not considered by the state court *Michel* vs. *Louisiana*, 350 U.S. 91, 97, 100 L. Ed. 83, 76 S. Ct. 158, *reh. denied* 350 U.S. 955, 100 L. Ed. 831, 76 S. Ct. 340 (1955) or (c) when the decision involved is a *state* issue decided in conformity with other decisions of that state. Rule 19. All three of the foregoing traditional reasons for refusing to review a state decision being present with respect to this claim, certiorari ought not be granted to review the former Connecticut bench warrant procedure.

IV.

The Remaining Claims Of The Defendant.

The remaining claims of the defendant do not warrant extended discussion. The third seeks review of a ruling on evidence (the ruling permitted the jury to hear evidence of questions asked of co-conspirators by the police out of the presence of the defendant during the conspiracy.) The fourth seeks review of various rulings permitting declarations of co-conspirators to be admitted in evidence. The fifth seeks review of various rulings sustaining objections to certain questions asked on cross-examination, and in refusing to permit the defense to examine a police officer's notes which notes were not introduced in evidence. The sixth would require an analysis of the evidence introduced to determine whether the court properly refused to charge the jury regarding multiple, as opposed to a single, conspiracy. The seventh again claims the court improperly sustained certain objections during cross-examination. The eighth objects to the use of certain tape recordings. The ninth claims all of the prior alleged infirmities as having some special significance because of their quantity rather than their quality.

All but the eighth — the claim about the tape recordings — struggle to raise the quality of the objection to that of "due process" dimensions. Even if each one had in fact been error, they hardly involve the substantial, important, and nationally significant deprivations of fairness with which this court has traditionally been concerned.

The claim about the tape recordings is misleading. Under "Questions Presented" the defendant forcefully presses his claim. (Def's. Brief p. 6) However, in his argument, he

BLEED THROUGH POOR COPY

admits that the issue was not raised in the state courts until after the decision was rendered by the Connecticut Supreme Court. (Def's. Brief p. 40) Further he fails to offer any reason why an exception to the general rule of refusing to review such a tardy claim should be made in this case.

For the foregoing reasons, certiorari should not be granted to review these remaining claims of the defendant.

CONCLUSION

For all of the reasons presented above, certiorari should be denied.

The State of Connecticut,
By DAVID B. SALZMAN,
Assistant State's Attorney,
121 Elm Street,
New Haven, Connecticut.

CERTIFICATE OF SERVICE

This is to certify that a copy hereof was mailed, pursuant to Rule 33.1 to:

F. LEE BAILEY,
1 Center Plaza,
Boston, Massachusetts.
ABRAHAM GLASSER,
52 Eighth Avenue,
New York, New York 10014.
RAYMOND J. DANIELS,
1 Center Plaza,
Boston, Massachusetts.

DAVID B. SALZMAN